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Nos. 1023 (1940 Term), 112

In the Supreme Court of the United States

OCTOBER TERM, 1941

C. L. WILLIAMS ET AL., PETITIONERS

v.

JACKSONVILLE TERMINAL COMPANY

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, DULY AUTHORIZED REPRESENTATIVE OF JAMES FOSTER AND OTHERS, PETITIONERS

v.

THE UNION TERMINAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of ad-

ministering and enforcing the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201, *et seq.*). Because these cases present significant questions of interpretation of the Act and of the rights and liabilities of employees and employers thereunder, the Administrator submits this brief as *amicus curiae*.

The Wage and Hour Division in 1939 conducted an investigation of the operation of the accounting and guarantee arrangement involved in these cases. The report of the presiding officer, which describes the machinery and the effects of the system, and the way it functions, is set forth in the record in the *Williams* case (No. 112, R. 148–164). The Administrator has since caused two injunction suits to be instituted against terminal companies whose redcaps were employed under plans identical with those established by the respondent companies.[1] The background and history of the problem are also outlined in a report, dated November 30, 1940, from the Administrator to the Chairman of the Senate Committee on Education

[1] *Fleming* v. *Cincinnati Union Terminal Company* (S. D. Ohio) No. 123; *Fleming* v. *Cleveland Union Terminals Co.* (N. D. Ohio), No. 20225. Both of these cases are still pending. The district court in the *Cincinnati* case dismissed the complaint on grounds of mootness because of substitution of a 10¢ a bag plan for the accounting and guarantee plan, but this decision was reversed by the Circuit Court of Appeals for the Sixth Circuit, 117 F. 2d 1012. The case has been remanded for trial, but not yet tried.

and Labor, on the then pending Senate Resolution No. 325, 76th Cong., 3d Sess. This report, which is part of the committee files on Senate Resolution No. 325 (see S. Rept. 260, 77th Cong., 1st Sess.), has been printed as Appendix B to the memorandum filed in this Court by the Administrator as *amicus curiae* in support of the petition for certiorari in No. 1023.[2]

OPINIONS BELOW

The written opinion of the district court in the *Pickett* case (No. 1023, R. 281–290) is reported in 33 F. Supp. 244. The opinion of the district court in the *Williams* case (No. 112, R. 195–203) is reported in 35 F. Supp. 267. The opinions of the Circuit Court of Appeals in the *Pickett* case (No.

[2] The 76th Congress, 3d Session, in which Senate Resolution No. 325 was pending, ended before the Resolution was acted upon. In the 1st Session of the 77th Congress, Senate Resolution No. 105, substantially identical with the previous Resolution, was adopted by the Senate on May 15, 1941. Senate Resolution No. 105 directs the Administrator to investigate the conditions and practices of employment of redcaps and the extent to which such conditions and practices violate the letter or spirit of the Act. The Administrator is also directed to make recommendations as to "what legislation, if any, should be enacted for the purpose of further regulating wages, hours, and other conditions and practices of employment of redcaps" under the Act. Pursuant to this direction, the Administrator has held public hearings, participated in both by redcaps and carriers, in Chicago, St. Louis, New York, and Washington, D. C., with further hearings already scheduled for Dallas. The Administrator's report to the Senate will be made after the conclusion of the hearings.

1023, R. 301–303) and in the *Williams* case (No. 112, R. 214–222) are reported in 118 F. (2d) 324 and 328.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 4, 1941. Petitions for writs of certiorari were granted by this Court on October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether tips given to redcaps by train passengers may be considered part of the wages which respondents are required to pay to their employees under Section 6 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201, *et seq.*, read as follows:

> Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) during the first year from the effective date of this section, not less than 25 cents an hour,
>
> (2) during the next six years from such date, not less than 30 cents an hour.[3]
>
> * * * * *

[3] Pursuant to authority conferred on him by Section 8, the Administrator promulgated a wage order, effective March 1,

SEC. 3. As used in this Act—

* * * * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Section 16 (b) permits employees who have not received the minimum wage provided for by Section 6 to institute suit, in their own names or through a designated agent or representative, for the unpaid minimum wages plus an additional equal amount as liquidated damages, and for attorney's fees.

STATEMENT

The facts in the two cases are substantially identical.[4]

The primary duty of redcaps is to carry the baggage of passengers alighting from and boarding trains arriving at and departing from railroad

1941, setting the minimum wage rate applicable to employees of Class I railroads at 36 cents an hour, and, for employees of short line railroads, at 33 cents an hour. Title 29, Chapter V, Code of Federal Regulations, Part 591 (published in the *Federal Register* on February 14, 1941).

[4] Some of the familiar facts as to what redcaps do and as to the general understanding of the parties when tips are received are not specifically set forth in the testimony but were judicially noticed in the lower courts (No. 112, R. 201, 217-218; No. 1023, R. 286). Since such facts are of common knowledge, this Court may also take judicial notice of them.

terminals (No. 1023, R. 124, 203; No. 112, R. 8–9, 86). For many years prior to the effective date of the Fair Labor Standards Act and during the period in question here, respondents made no charge to the passengers for the services of the redcaps and paid the redcaps no wages (No. 1023, R. 202–205; No. 112, R. 85–91). The redcaps were required to render service to passengers whenever requested but were forbidden to solicit tips or make any charge (No. 1023, R. 173, 203–205; No. 112, R. 91). Although the passengers were under no legal obligation, either to respondents or to the redcaps, to pay for the latter's service, most passengers rewarded the redcaps with tips (No. 1023; R. 204; No. 112, R. 87). The tips varied in amount, depending upon the number of packages carried by the redcaps, their efficiency and affability, the financial ability and temper of the passengers and other cognate factors (No. 112, R. 85–91, 201; No. 1023, R. 204–205). The passengers giving tips did so with the intention of having the redcaps keep them and with the understanding that such was the prevailing practice (No. 112, R. 217–218). During the period before the passage of the Act the redcaps relied for their income exclusively on tips given by passengers (No. 1023, R. 46–47, 174, 202; No. 112, R. 85, 89), and respondents never claimed ownership of the tip money (No. 1023, R. 48–49, 206–207; No. 112, 86, 88, 91).

On September 29, 1938, pursuant to authority granted in Section 1, Fifth, of the Railway Labor

Act, the Interstate Commerce Commission held redcaps to be employees of the carriers. *Ex Parte* No. 72 (Sub. No. 1) 229 I. C. C. 410 (September 29, 1938); 232 *Id.* 49 (No. 1023, R. 177–195). On October 24, 1938, the Fair Labor Standards Act became effective.

In Dallas on October 22 and in Jacksonville on October 24 respondents delivered to each of their redcaps a copy of the following identical notice (No. 1023, R. 127–128; No. 112, R. 121–122):

> In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.
>
> The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.
>
> You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

> All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

There is no indication that respondents informed travelers by publication or otherwise of the inauguration of this "accounting and guarantee" system (No. 1023, R. 23; No. 112, R. 10, 219).

In each case the chosen representative of the redcaps promptly protested against respondents' attempt to include tips within the wages due the employees under the statute (No. 112, R. 72, 78–79; No. 1023, R. 128–130).[5] Attempts by these representatives over a long period to reach agreements with respondents on the question were unsuccessful (No. 1023, R. 153–154, 198–199; No. 112, R. 72–73, 76–79, 125–128), although agreements governing terms of employment other than wages were finally signed (No. 112, R. 73, 107–116; No. 1023, R. 126, 134). Respondents' position in each instance was that they were entitled as a matter of law to include tips in wages, and that they would enter into no agreement on that subject until after the matter had been determined by the courts (No. 1023, R.

[5] In Dallas the first protest was made on October 24th, two days after the plan was announced and the day it was to become effective (No. 1023, R. 128–130), and in Jacksonville on November 4th, eleven days after announcement of the plan. (No. 112, R. 72).

134, 153–154, 287; No. 112, R. 76–78, 81–84, 125–126, 136–137, 216). Respondents never claimed, however, that the redcaps had voluntarily agreed to their accounting and guarantee plan (No. 112, R. 136–137, 198; No. 1023, R. 134, 286, 287).[6] No agreement was ever reached as to the disposition of the tips.

While the negotiations were going on and despite the protests, the plan set forth in the notice was put into effect. From October 24, 1938, through the period covered by these cases the redcaps were required to file reports showing the hours worked and their tips,[7] and the respondents paid the redcaps the amount, if any, by which the statutory minimum wage exceeded the tips reported (No. 1023, R. 124, 131–132, 212; No. 112, R. 11, 47–50). On July 1, 1940, the Jacksonville terminal abandoned the accounting and guarantee plan and substituted a plan under which it paid the redcaps the statutory minimum wage and charged the passengers 10 cents a bag (No. 112, R. 64–65).

It is clear that the redcaps were engaged in interstate commerce and that they were employees

[6] We do not mean by this that the attorneys for respondents in this litigation have not argued that the redcaps must be taken to have accepted the plan as a matter of law, but only that respondents understood in fact that there had been no meeting of minds.

[7] Between March 1, 1939, and October 15, 1939, the Dallas terminal assumed that tips were equal to the statutory minimum unless a report to the contrary was filed (No. 1023, R. 130–131).

of respondents. We do not believe that respondents in this Court will challenge either of these propositions.

The redcaps in Jacksonville and Dallas through their collective bargaining representatives brought these suits, pursuant to Section 16 (b) of the Fair Labor Standards Act, to recover the difference between the amounts respondents had paid them and the statutory minimum wage. In the *Pickett* case the district court held that the tips when given were the property of the redcaps, that there had been no agreement between the redcaps and the carriers whereby the tips became the property of the latter, and that accordingly the tips could not be considered wages paid by the employer as required by Section 6 of the Act (No. 1023, R. 276–290). The district court in the *Williams* case held, on the contrary, that redcaps were not employees of the carrier, but that even if they were, the tips were received through "facilities" ("the Station and the passengers" (No. 112, R. 200)) furnished by the carrier, and that Section 3 (m) of the Act permitted tips to be included in the minimum wage because of this fact (No. 112, R. 200–202).

The circuit court of appeals, Judge Holmes dissenting (No. 112, R. 221; No. 1023, R. 303), reversed the *Pickett* decision and affirmed the *Williams* decision, although rejecting both of the reasons advanced by the district court in the latter case (No. 1023, R. 301–302; No. 112, R. 214–221).

The opinion of the circuit court of appeals recognizes that tips, before the enactment of the Fair Labor Standards Act, were the property of the redcaps and that there had been no agreement between the parties altering this situation. The court held, however, that the Fair Labor Standards Act itself, without regard to the consent of the parties, converted the tips into the property of the employer and that accordingly the receipt of tips from passengers constituted the payment of wages by the employer.

SUMMARY OF ARGUMENT

Section 6 of the Fair Labor Standards Act requires the employer to pay minimum wages to his employees. The giving of tips by passengers is clearly not the payment of wages by the employer within the meaning of the words used in the statute.

A. Tips were unquestionably the property of the redcaps at the time the Fair Labor Standards Act was passed. Nothing in the Act supports the conclusion of the circuit court of appeals that the statute in and of itself converted the tips into the property of the employer. Nor may tips be included in wages on the theory that they result from any facilities ("the Station and passengers") furnished by the carrier within the meaning of the definition in Section 3 (m). That section on the contrary is an indication that Congress did not intend to expand the definition of wages so as to bring tips within it.

The employers did not have the right to make the tips their property without the consent of the employees. The relationship of agency, or master and servant, is consensual. Except where an agreement may be implied in fact, the master may not unilaterally determine their conditions of employment.

B. The three lower courts found that the redcaps did not in fact consent to or acquiesce in respondents' plan. On the contrary they protested against it, and both parties understood that the issue was one which would be determined by the courts. Respondents' argument assumes that by reason of the redcaps' continuance at work under the plan, consent must be implied as a matter of law. But the implication of acceptance, commonly drawn from an employee's conduct in working for an employer, is one of fact, subject to rebuttal by a showing that there actually was no meeting of minds or manifestation of mutual assent.

In addition, provisions of the Railway Labor Act require that all disputes between carrier and employees be handled amicably in conference. This precludes an employer from unilaterally imposing terms of employment over his employees' protests and without collective bargaining. The policy of the Railway Labor Act that interstate transportation not be interrupted is inconsistent

with the contention that the employees forfeited their claim by remaining in service and seeking to settle the dispute peacefully instead of leaving their jobs as soon as the carriers' terms were made known.

C. Moreover, any consent by the redcaps to the "accounting and guarantee" plan would have been ineffective to waive their rights under the law. The plan did not provide that the tips were not to be the redcaps' property. The requirements of the Fair Labor Standards Act are not met if an employee is compelled to agree to surrender some of his own money to the employer in return for the statutory minimum wage.

ARGUMENT

TIPS GIVEN BY PASSENGERS TO REDCAPS ARE NOT PART OF THE WAGES RESPONDENTS ARE REQUIRED TO PAY UNDER SECTION 6 OF THE FAIR LABOR STANDARDS ACT

The issue before this Court is extremely simple. The Fair Labor Standards Act requires that "every employer shall pay" the prescribed wages to his employees (Section 6). Clearly, within the meaning of the words used, the giving of tips by passengers is not the payment of wages by an employer.

"To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers is to

assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day, understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so." (*Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, 437.)[8]

Respondents in the courts below have suggested a number of reasons for not giving the language of the statute its plain meaning. The arguments are divided into two main categories: (1) that the tips are to be counted as wages, irrespective of the consent or agreement of the redcaps, and (2) that the tips may be counted as wages because the redcaps have agreed to respondents' plan. The first of these contentions is, we believe, erroneous as a matter of law, and the second is contrary to the findings and evidence in both of these cases.

[8] In the case cited Judge Otis concluded that the redcaps had agreed that the tips became the property of the carrier, and that by reason of such agreement the tips were properly included in the wages paid. His opinion expressly differentiates the case before him from the present cases, in which no such agreement appears. (36 F. Supp., at 437–438, n. 6; see pp. 26–31, *infra*.)

A. THE RECEIPT OF TIPS FROM PASSENGERS IS NOT THE PAYMENT OF WAGES BY THE EMPLOYER

1. *The tips were the property of the redcaps*

The statute requires that the employer pay the wages to the employee. This mandate, as the circuit court of appeals recognized (No. 112, R. 219), cannot be carried out unless some property or funds of the employer are transferred to the employee.[9]

There would seem to be no question that, before the passage of the Act and the notice given by respondents, the tips given by passengers were the property of the redcaps.[10]

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[9] Respondents argue that the statutory requirement that the employer pay wages does not require it "manually to transfer" money from its general treasury to its employees. Dictionary definitions are cited to the effect that "pay" means "satisfy or discharge obligations." All this can be conceded. But *the employer* does not pay, within the meaning of the Act, unless the obligation is discharged, whether by manual transfer or otherwise, out of his own funds or property. To take the illustration used by the circuit court of appeals, a trolley conductor may be paid out of funds collected without any manual transfer of funds, but he is paid by the employer, because the money which he retains as a wage is his employer's property. Since the tips are the property of the redcaps and not of the employer, the employer is not paying when the redcaps retain the tips.

It is also contended that the employer is entitled to credit for amounts set off against debts owed by employees, and that the tips were owed by the redcaps to the employer. This argument begs the question, for its premise is that the tips belonged to the employer. This assumption is, we believe, unsound. See pp. 15–19, *infra*.

[10] In the absence of legislation, tips are considered the property of the employee and, as such, recoverable from the

The widespread practice of tipping redcaps stemmed from the public's knowledge of the relationship between porters and their employers. Passengers, aware that redcaps received no wages from the carriers and that their earnings depended upon public solicitude, gave tips to the redcaps on the assumption that the tips would be retained by them. The passengers' intention coincided with the understanding between the redcaps and the terminal companies. The porters, viewing the tips as their personal property, always retained the gratuities collected. Taking a similar view of the ownership of the tips, the terminal companies never asserted a claim thereto. The intention of the passengers in giving and of the redcaps in receiving the gratuities combined to make the tip money the property of the porters.[11]

T is, the circuit court of appeals agreed, was the situation before the passage of the Act (R. 218). But it is asserted that the enactment of the statute effected a shift in ownership from the porters to respondents, without regard to the consent of the redcaps or the intention of the passengers (No. 112, R. 218). The court does not refer

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employer when turned over to him by mistake. *Zappas* v. *Roumeliotis*, 156 Iowa 709, 137 N. W. 935 (1912); *Poates* v. *Barlin*, 149 Ky. 376, 149 S. W. 828 (1912); *M'Rae* v. *M'Beath* (1847), 5 N. B. 446; Note 13 A. L. R. 905, 921; and see American Law Institute, *Restatement of the Law of Agency*, pp. 871–872.

[11] These facts, which are of common knowledge, were judicially noticed by the circuit court of appeals (No. 112, R. 217–218).

to any section of the Act which sanctions or impels such a result. The statute, we submit, contains no provision which purports to take away from any employee property which otherwise would be his. The tip money, indisputably the property of petitioners before the Act, did not automatically become the property of respondents through passage of the statute.

The rationale of the decision below seems to be that respondents, through their redcap employees, rendered porter service to passengers and that the tips accordingly constituted payment by the passengers to respondents for such service. But this was no more the case after than before the Fair Labor Standards Act, and it was conceded by the court below that before the passage of the Act the tips were the property of the redcaps and not of respondents (No. 112, R. 218).

It is, of course, clear that the passenger does not pay a tip to satisfy any obligation imposed by the carrier. Although such service may be a transportation service for which respondents could have charged passengers,[12] the record establishes that, prior to the Act and during the period of the "accounting and guarantee" plan, respondents did not

[12] *Stopher v. Cincinnati Union Terminal Co.*, 246 I. C. C. 41 (1941). Payment of the fare for transportation may be taken to include payment for redcap service in the absence of any additional charge. *Franklin* v. *Southern Pac. Co.*, 203 Cal. 680, 265 Pac. 936 (1928), certiorari denied, 278 U. S. 621; cf. *Herbert* v. *Shanley Co.*, 242 U. S. 591.

impose such a charge. For not only did respondents not compel passengers to pay a specified fee for the service;[13] the passengers were not required to pay anything, and the redcaps were forbidden even to suggest that any compensation was due. If the payment is not made in fulfillment of an obligation, it plainly is a gratuity, irrespective of the compunctions which a non-tipping passenger may feel. The effect of the decision below is to hold that the passengers, despite their actual intention that the tips be retained by the redcaps, are in fact unknowingly conferring a gratuity upon the terminal company.

The circuit court of appeals (No. 112, R. 219) and respondents have sought to support the "accounting and guarantee" plan by analogizing the redcap's position to that of a trolley conductor or salesman who, with his employer's authorization, takes his salary out of fares or commissions collected from passengers or customers. But the

[13] The Interstate Commerce Act (Sections 2 and 6 (7)) requires that all charges for transportation service be uniform, and that they be filed with the Interstate Commerce Commission. Since tips given were permitted to vary with the whim of the passenger, they cannot be treated as payments of charges or legal obligations imposed upon the passenger without attributing to respondents a violation of specific and familiar provisions of the Interstate Commerce Act. The Commission recently held that, during the period of the "accounting and guarantee" plan, the Act was inapplicable because "service was, until recently, rendered without a direct charge to the passenger." *Stopher* v. *Cincinnati Union Terminal Company*, 246 I. C. C. 41, 46.

trolley passenger or the purchaser from the salesman is legally indebted to the employer; all the parties to the transaction understand that he is discharging his obligation to the employer when he pays the employee, and that the money paid and retained by the employee belongs to the employer. The absence of these vital factors when tips are paid to redcaps makes the analogy entirely inapposite.

2. *Section 3 (m).*

The district court in the *Williams* case (No. 112) came to the conclusion that "the Station and passengers" were facilities furnished by the employer within the meaning of Section 3 (m) of the Act, which defines wages to include the reasonable cost of furnishing employees "with board, lodging or other facilities" (No. 112, R. 200–202). The circuit court of appeals properly found that the terminal was not a facility furnished to redcaps, but something "which the employer keeps for use in his own business" (No. 112, R. 220). It is obvious that the station and passengers do not fall within the class of "board, lodging, and other facilities" treated in Section 3 (m).

This section nevertheless is not without significance. It shows that Congress was concerned as to the definition of "wages" as used in the Act. Congress was undoubtedly as "familiar with the tipping practice" (No. 1023, R. 290), as with the deductions permitted by Section 3 (m); its failure

to include tips within the definition is an indication that, insofar as tips were concerned, the term "wage" was to be given its ordinary meaning.

3. *The power of the employer to make the tips his property*

Respondents argue that irrespective of anything in the statute or the consent of the employees, the employer has the right to assume the ownership of tips paid to the redcaps for services rendered during the course of their employment. This argument is based on authorities which stand for the general principle that the earnings of an employee in the course of his employment belong to the employer. See *Restatement of Agency*, Section 388, p. 870; Note, 13 A. L. R. 905; 39 C. J. 125; Labatt, *Master and Servant* (2d ed., 1913), Vol. 5, p. 6320. The *Restatement* makes it plain, however, that the rule is applicable only "unless otherwise agreed" by the parties (Section 388, p. 870), and that "an agent may retain gratuities received on account of the principal's business if, because of custom or otherwise, an agreement to this effect is found" (Section 388, p. 871). The basis of the principle is thus the understanding of the parties, not a dominant power of the employer to force conditions of employment upon an unwilling employee.

Clearly where, as in the case of redcaps, there is a custom manifesting the parties' understanding to the contrary, the rule does not prevail. This is indicated not only by all of the decisions dealing

directly with the right of employees to keep tips for themselves (see, p. 16n, *supra*), but also by the cases cited on the point in *all* authorities relied upon by respondents.[14] The cases upon which respondents rely all deal with entirely different situations.[15]

Respondents' argument is suggestive of the conception that the servant, as successor to the slave, is bound without limitation by the will of the master. Cf. Holmes, *The Common Law*, pp. 226, *et seq.* But in a society of free men the relationship of agency, or master and servant, is a contractual one founded upon the intention of the parties. Cf. *Restatement of Agency*, Sections 1, 15, pp. 7, 50; *Mechem on Agency* (1889) Sec. 1, pp. 1–2.

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[14] 39 C. J. 125; Labatt, *Master and Servant* (2d ed, 1913), Vol. 5, pp. 6334, 6321–6322. The quotation from a footnote in Labatt (p. 6322) as to the "true doctrine" is admittedly contrary to the authorities cited in the same section.

[15] The cases cited involve such questions as the right of an agent to make a secret profit through a breach of fiduciary duty (*Morrison* v. *Thompson*, L. R. 9 Q. B. 480 (1874)), or the status of proceeds received or claimed by a servant or agent while working for another rather than his employer on his employer's time (*Reynolds* v. *Roosevelt*, 8 N. Y. Supp. 749 (1890)); cf. *Sheppard Publishing Co.* v. *Harkins*, 9 Ontario L. R. 504 (1905), or the right of an employee to recover from the employer for notary service for which he has not been paid anything in addition to his regular wage. *Leach* v. *The Hannibal & St. Joe Ry. Co.*, 86 Mo. 27 (1885).

The cases on the subject are collected in Note, 13 A. L. R. 905. The Note shows that tips have uniformly been held to be the property of the employees (p. 921).

Once the terms of employment are fixed by custom or express or implied agreement, they cannot be changed by the employer alone, unless, by necessary implication or otherwise, the employees' acceptance is obtained.[16]

We do not mean to suggest that ordinarily an employer may not fix the conditions of employment and require his employees to abide by them. But the obligation imposed upon the employee is derived from his consent to the conditions, implied from his engaging in the work of the employer, not from the employer's power to determine conditions irrespective of the employee's consent. For reasons to be discussed, the principle of implied acceptance cannot be availed of by respondents in these cases. See, pp. 26–32, *infra*.

4. *Provisions of other statutes*

Both petitioner (in No. 1023) and respondents rely on provisions in other statutes as an aid to the

[16] This does not mean that an employer may not require an employee to obey his instructions, for every contract of employment, by implication of fact unless the contrary appears, gives the employer such authority. But this power unilaterally to determine how his business shall be run does not extend to changes in the most vital provisions of the contract of employment, such as those relating to wages, without obtaining at least the implied acceptance of the employee to the new conditions. Although an employee would understand, without anything being said, that acceptance of the job required him to obey orders, he would not assume that the employer could lower his wages at will, without his consent or acquiescence.

construction of the Fair Labor Standards Act. The Railroad Retirement Act of 1937 [17] and related statutes [18] define "compensation" so as specifically to exclude tips, thus indicating that in legislation for the benefit of railroad employees Congress has not intended tips to be treated as compensation. The term "compensation" found in those statutes is, of course, broader than the reference to "wages" paid by the employer in the Fair Labor Standards Act and the purposes of the two Acts are in no way comparable.[19]

Respondents refer to decisions under workmen's compensation and unemployment compensation acts. But these all deal with the calculation of benefits under such statutes; such benefits are normally based on "earnings" or "compensation" or "advantages received from the employer," expressions broader than those found in the Fair Labor Standards Act. In order to insure employees of benefits based upon the real income de-

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[17] 50 Stat. 307, 45 U. S. C., Supp. V, Sec. 228a (h).

[18] The Carriers Taxing Act of 1937, 50 Stat. 485, 45 U. S. C., Supp. V, Sec. 261 (e), and the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C., Supp. V, Sec. 351 (i).

[19] The Railroad Retirement Board has held that amounts paid redcaps by passengers where the "accounting and guarantee" plan is in effect do not constitute tips. Railroad Retirement Board, Opinion No. 1941, R. R. 35, U. I. 11, September 18, 1941. This opinion is based on the language and purposes of the Railroad Retirement Act, and it expressly disclaims any relationship between the problems treated under the Retirement Act and those arising under the Fair Labor Standards Act (p. 11).

rived from their employment, regardless of the source, the courts have generally held that tips are to be considered in measuring the awards to be granted.[20] For the same reasons the Bureau of Internal Revenue has held that tips are to be included in the basis for compensation under the Social Security Act (S. S. T. 301, 1938–1 Cum. Bull. 456); the definition of wages in that statute as meaning "all remuneration for employment" supports the broad interpretation (49 Stat. 639, 642, 42 U. S. C., Supp. V, Secs. 1011 (a), 1107 (b)).

It is apparent that the diversity of language and purpose in the statutes referred to entitles them to little weight as guides to the construction of the Fair Labor Standards Act. As this Court has recently pointed out (*Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353):

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.

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[20] *Bryant* v. *Pullman Co.*, 188 App. Div. 311, 177 N. Y. Supp. 488, affirmed 228 N. Y. 579, 127 N. E. 909 (1920), certiorari granted sub nom., *Pullman Co.* v. *State Industrial Comm.*, 254 U. S. 624, certiorari dismissed on stipulation, 254 U. S. 666; *Gross' Case*, 132 Me. 59, 166 Atl. 55 (1933); *Powers' Case*, 275 Mass. 515, 176 N. E. 621 (1931); *Sloate* v. *Rochester Taxicab Co.*, 177 App. Div. 57, 163 N. Y. Supp. 904, affirmed 221 N. Y. 491, 116 N. E. 1076 (1917); *Kadison* v. *Gottlieb*, 226 App. Div. 700, 233 N. Y. Supp. 485 (1929); *Lloyds Casualty Co.* v. *Meredith*, 63 S. W. (2d) 1051 (Tex. 1933); but cf. *Alexander Hamilton Hotel Corp.* v. *Board of Review of Unemployment Comp. Comm.*, Sup. Ct. N. J., September 16, 1941.

5. The purposes of the Act

Petitioners (No. 1023, Br. pp. 49, *et seq.*) and respondents both argue that their respective interpretations of the Fair Labor Standards Act are supported by the underlying purpose of the statute. We do not find it necessary to repeat or refer in detail to these conflicting arguments. The legislative history of the Act contains nothing to indicate that any legislator had the tipping problem in mind. Thus, there cannot be said to be any expressed legislative intention on the point, except as manifested in the language of the statute. Although legislative purpose is always an aid to the construction of a law, the normal rule is that the language used is the first and best guide to the intention of the legislature; only if the words of a statute are ambiguous, or if they lead to an absurd or unreasonable result, or if the purpose of the legislature on this point has been otherwise clearly expressed, will legislative purpose be deemed controlling. Cf. *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

Since in this case there is clear and unambiguous language and no other direct expression of legislative intention on the point, arguments based on the assumed "purpose of Congress" have little force.[21]

[21] If, however, the Court is to assay the congressional purpose, it should consider the effect of the accounting and guarantee plan upon the administration and enforcement

B. THE REDCAPS DID NOT AGREE THAT THE TIPS WERE THEIR EMPLOYER'S PROPERTY OR A PORTION OF THE WAGES PAID BY THE EMPLOYER

We have shown that before the announcement of the "accounting and guarantee" plan the tips were the property of the redcaps, and that, apart from any consent on the part of the redcaps, respondents were not entitled to treat tips as wages under the Fair Labor Standards Act. Respondents argue, however, that the redcaps did consent to the new arrangement and that this was sufficient to change the status of the tips.

This contention is, we submit, contrary to the findings of both the district courts and of the circuit court of appeals. Even in the *Williams* case, which was decided in respondents' favor, the district court found that (No. 112, R. 198), "It does not appear that the redcaps acquiesced in or consented to the plan set forth in said notice" and that "neither side contends that the notice, negotiations, and discussions amounted to a contract."[22] The

of the Act. The report to the Administrator of the Wage and Hour Division, reprinted in the record in No. 112, R. 148–164, shows that redcaps frequently were afraid to report that they had received in tips less than the statutory minimum wage for fear of losing their jobs (No. 112, R. 156–158). Acceptance by the carriers of the redcaps' "accounts" as the basis for the amounts paid also was found to result in inaccuracies and to make effective enforcement of the Act by the Administrator difficult (No. 112, R. 158, 164).

[22] Express findings to the same effect in the *Pickett* case may be found at No. 1023, R. 277, 280, 286–288.

opinions of the circuit court of appeals also admit that "the redcaps did not agree to the plan stated in the notice to them" (No. 1023, R. 302; cf. No. 112, R. 216)). These findings of the three lower courts, since not unsupported, should be accepted by this Court. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 542; *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 558.

1. *Consent to the "accounting and guarantee" plan cannot be implied from the fact that the redcaps remained at work*

Respondents' argument is that because the redcaps remained at work after it was announced, their acceptance of the "accounting and guarantee" plan must be implied. But the redcaps, through their representatives, protested against the plan and expressly refused to accept it (No. 112, R. 72–84; No. 1023, R. 128–130, 198–199).[23] It does not appear that during the negotiations respon-

[23] Although the plan was put into effect by respondents, the conduct of the redcaps in informing respondents as to the amount of money received as tips and in accepting from respondents the difference between the tips and the statutory wage was not a consent to the plan or a waiver of statutory rights. For the redcaps could take a portion of what was due them without forfeiting their right to the remainder, and they would have obtained nothing from respondents unless they accounted for the tips received. They did not accept the amounts paid them by respondents as payment in full, but on the contrary protested that the amount was insufficient (No. 112, R. 165).

dents even suggested that the redcaps had consented to it (No. 1023, R. 198–199, 280, 286–287; No. 112, R. 76–78, 81–82, 198). Indeed, respondents themselves recognized the failure of the parties to agree to the plan by taking the position that the issue was before the courts and that the ownership of the tip money would not be a subject of negotiation or agreement until the question had been judicially determined (No. 1023, R. 134, 153–154, 287; No. 112, R. 76–78, 81–84, 136–137, 216).

When agreements were finally made covering other conditions of employment, the question of wages and the status of tips was expressly left open (No. 1023, R. 134, 153–154; No. 112, R. 73, 107–116). Thus it is clear that both parties assumed that the question was a legal one on which they had disagreed, and that it was to be determined by the courts upon the basis of such disagreement, not upon the untrue assumption that the redcaps had consented to the plan.

We do not deny that ordinarily the conduct of an employee in working for an employer under specified terms will be taken to be an acceptance of such terms. Under such circumstances there is presumed to be an implied acceptance, implied in fact because the conduct of the employee manifests his assent to the employer's terms and thus makes a contract. But respondents here are insisting that the presumption that acceptance is to be implied when the employees remain at work constitutes an

inflexible rule of law, to be given effect irrespective of the actual expressed intention of the parties.

The terms of the relationship between employer and employee are a matter of contract, which, as in all matters of contract, are dependent upon manifestations of assent by the parties. American Law Institute, *Restatement of the Law of Contracts*, Sections 19–22, pp. 24–27; Williston, *Contracts* (Rev. Ed. 1936), Sections 66–67; *National Bank* v. *Hall*, 101 U. S. 43, 49; *Utley* v. *Donaldson*, 94 U. S. 29, 47. The implication of assent to the employer's terms arising from the employee's continuing at work under them is one of fact and not of law. Cf. *Baltimore & Ohio R. R.* v. *United States*, 261 U. S. 592, 597; *Klebe* v. *United States*, 263 U. S. 188, 192; Williston, *supra*, Section 3; Costigan, *Implied-In-Fact Contracts and Mutual Assent*, 33 Harv. L. Rev. 376, 381–382. As such, it is subject to rebuttal by a showing of the real understanding of the parties, the implication having the effect, at most, of a presumption. *Silva* v. *Providence Hospital*, 14 Cal. (2d) 762, 97 Pac. (2d) 798, 804, and cases cited. See *Smith Baking Co.* v. *Behrens*, 125 Nebr. 718. The actual intention of the parties, at least when openly manifested between them, overcomes the implication of fact which might otherwise be drawn. *Consolidated Products Co.* v. *Blue Valley Creamery Co.*, 97 F. (2d) 23 (C. C. A. 8), certiorari denied, 305 U. S. 629; *Miller* v. *Schloss*,

218 N. Y. 400, 406; *Smith Baking Co.* v. *Behrens,* 125 Nebr. 718; *Earle* v. *Coburn,* 130 Mass. 596; *American Mutual Liability Insurance Co.* v. *McDiarmid,* 211 Ala. 127, 128; Williston, *op. cit. supra,* Secs. 66–67; cf. *Freund* v. *United States,* 260 U. S. 60. Closely in point is *Consolidated Products Co.* v. *Blue Valley Creamery Co., supra.* In that case, the defendant, though refusing to agree that the contract price was binding upon it, continued to accept milk which the plaintiff insisted was being delivered under the contract. The court held that there was no contract, saying (97 F. (2d) at 28):

> It is well-settled that a contract cannot be implied in fact against the express declaration of a party. A contract implied in fact is based on conduct showing an intention to contract, and the implying of such a contract in the face of denials has been described as a contradiction in terms. [Citing authorities.]

Respondents have pointed to cases which hold that an employee who protests against his employers' conditions but continues at work will be deemed to have accepted them. *Shuppan* v. *Peoria Ry. Terminal Co.,* 30 F. (2d) 569 (C. C. A. 7); *L. G. Balfour Co.* v. *Brown,* 110 S. W. (2d) 104 (Tex. Civ. App.); *contra, Smith Baking Co.* v. *Behrens,* 125 Neb. 718. These cases may perhaps be supported on the ground that both parties recognized that by continuing at work the employees did in fact, and despite the protests, accept the employer's terms.

But the records in the instant cases show that there was no such understanding here. As the lower courts found, respondents recognized that the employees had not agreed to their terms, and that no agreement could be reached until the question of law was determined by the courts.

2. *The Railway Labor Act*

Even apart from the general principles of contract law, which, we believe, sustain the holding of the lower courts that the redcaps had not agreed to respondents' plan, the same result would be compelled in view of the provisions and purposes of the Railway Labor Act. Section 2 requires that all disputes between the carriers and their employees be considered in conferences between their representatives (Section 2, Second). The Act goes so far as to make it a crime for carriers to change the terms of employment as embodied in agreements without the holding of such conferences (Sections 2, Seventh, and 6). Even though the latter provisions are not applicable here because of the absence of a pre-existing agreement, they demonstrate that the policy of Congress is violated if an employer may, in disregard of the protests of his employees' representatives, force new conditions of employment upon them before any collective bargaining takes place.

The fundamental purpose of the Railway Labor Act is, of course, the prevention of any interruption to interstate transportation. Respondents in-

sist that because the employees remained at work they must be deemed to have consented to the terms against which they protested. On respondents' theory the redcaps had the alternatives either of consenting or of striking. But the policy of the Railway Labor Act is that employees shall not leave the service until all peaceful means of settling disputes have been exhausted; the Act creates detailed machinery which is to be availed of in order that disputes may be settled amicably without any stoppage of transportation. To hold that employees have consented to the forfeiture of their claims, because, instead of striking when the employer suddenly announces new terms of employment, they protest and seek to settle the dispute peacefully while remaining in service, would obviously contravene this fundamental policy and the purpose for which the statutory machinery was established. A premium would be placed on strikes as against the peaceable settlement of controversies. Such a result would be contrary to the public policy embodied in the Railway Labor Act that labor disputes be disposed of without resort to economic warfare.

C. ANY CONSENT BY THE REDCAPS TO THE "ACCOUNTING AND GUARANTEE" PLAN IS INEFFECTIVE TO DEFEAT RECOVERY

Even if the redcaps' continuance at work under the "accounting and guarantee" plan be considered a consent to its terms, they are still entitled to recover. Before the inauguration of the plan, the tips when given were clearly the property of the

redcaps (see p. 15, *supra*.) The plan as set forth in the notices distributed to the redcaps (No. 112, R. 121–122, No. 1023, R. 127–128) provided that the tips, although retained by the redcaps, were to be credited against the statutory minimum wage. The notices did not state that the tips, when given, were no longer to be the redcaps' property, but merely provided, in effect, that the redcaps were to turn over *their* property to respondents to be applied to the minimum wage respondents were required to pay.[24] The fact that the passengers paying the tips were not notified as to any change in the status or ownership of the tips they paid and that they still intended the tips to belong to the redcaps supports the conclusion that no change from the situation prior to the Act occurred or was intended.

Since the tips remained the redcaps' property when received, their consent to the plan would have amounted, at most, to an agreement that they would turn over some of their own funds or property to respondents in return for the minimum wage. This is not, we submit, a compliance with the Act. If an employee may not by contract directly waive his statutory rights,[25] he cannot

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[24] The carriers at that time had not entirely receded from the position that redcaps were not employees (No. 1023, R. 22–23, 175, 283; No. 112, R. 7, 128, 201, 215).

[25] "Private agreements which are inconsistent with wage and hour statutes must yield to the broader public policy declared in those acts." *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754, 757 (D. Minn.); *Fleming* v. *Warshawsky and Co.* (C. C. A. 7th), November 27, 1941.

achieve the same result by surrendering some of his own money to the employer in order to secure payment of the statutory wage. Employers cannot avoid their obligations under the Fair Labor Standards Act "by inducing their workmen to agree not to demand performance of the duties which it imposes * * *." Cf., *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364.

CONCLUSION

For these reasons it is respectfully submitted that the judgments of the circuit court of appeals should be reversed.

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4 Wage & Hour Rept. 678; cf. *United States* v. *Morley Const. Co.*, 98 F. (2d) 781, 788 (C. C. A., 2d), certiorari denied, sub nom. *Maryland Casualty Co.* v. *United States*, 305 U. S. 651.

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